

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

NIARA W.

Claimant,

v.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER

Service Agency.

OAH Case No. 2010110678

DECISION

Administrative Law Judge Sophie C. Agopian, Office of Administrative Hearings, heard this matter on June 22, 2011, in Lancaster, California. Claimant was represented by her grandmother.¹ Rhonda Campbell, Contract Officer, represented the North Los Angeles Regional Center (Service Agency). Testimonial and documentary evidence was received and the matter was submitted for decision on the day of the hearing.

ISSUE

Whether claimant is eligible to receive services from Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act) and related regulations.

¹ The surnames of claimant and her family members are omitted for privacy purposes.

FACTUAL FINDINGS

1. Claimant seeks to obtain services from the Service Agency, but the Service Agency determined that she is not eligible to receive services under the Lanterman Act because she does not have an eligible disability. Claimant properly appealed the Service Agency's decision and this hearing ensued.

2. Claimant is 16 years old. Claimant has lived with her grandmother since she was two weeks old. At almost three years of age, she was referred for a developmental assessment because she was born prematurely and had tested positive at birth for cocaine. According to a report, she was delayed in all developmental areas, including precognition, language, adaptive skills, social behaviors and fine motor skills. She was referred for an assessment by the South Central Los Angeles Regional Center (SCLARC).

3. At age three, SCLARC conducted a social assessment of claimant to determine her levels of functioning. The assessment included a review of her medical records, the developmental assessment and visual observations and interactions with claimant. According to the assessment report, claimant was "engaging and cooperative during [the] meeting." She exhibited delays in self-care, such as toileting and drinking from a cup, and was also delayed in expressive communication. She was noted to be "overly active" with a "short attention span." (Exhibit 2.)

4. At age four, SCLARC conducted a psychological assessment of claimant to determine if she met the eligibility criteria for regional center services. Pursuant to the psychologist's diagnostic impressions, claimant exhibited "Attention-Deficit/Hyperactivity Disorder, Combined Type (Rule Out)" on Axis I and "Borderline Intellectual Functioning (With Higher Potential Suggested)." Claimant was referred to an "appropriate preschool placement to stress development in all areas" and her grandmother was referred to a "parenting program to assist... in managing [claimant's] behaviors in the home." In March 1999, SCLARC determined that claimant was not eligible for regional center services. Its determination was not disputed.

5. Claimant's grandmother thereafter referred claimant for a special education evaluation from her school district. Claimant was determined to be eligible for special education services in September 1999 due to a specific learning disability (SLD). Claimant has received special education services from her school district from preschool through high school.

6. According to claimant's individualized education program (IEP), dated May 21, 2010, her learning disability consists of "deficits in visual processing which causes difficulties with sequencing, memory, information processing and assignments presented visually in class lectures and when lessons are not broken into smaller segments, with additional visual supports." She demonstrates discrepancies between her ability to learn and her achievement level in "math reasoning, basic reading, and reading comprehension." Her

learning disability prevents her from accessing “core content curriculum and requires specialized academic support through special day classes.”

7. When Claimant was 15 years old and in the ninth grade, her grades suffered due to her not completing her work in class, not participating in class, and absences. It was also indicated that although she requires glasses, she does not wear them in class. Claimant was therefore required to attend summer school. This evidence was undisputed.

8. Sometime before Fall 2010, when claimant entered the 10th grade, claimant’s grandmother requested an evaluation from Service Agency. The reason for the request was that the grandmother suspected that claimant had autism. Furthermore, since the time that claimant had been assessed by SCLARC, she had also been diagnosed with Schizoaffective Disorder and Bipolar Disorder. Additionally, claimant’s grandmother reported that Claimant’s two brothers, ages 8 and 16, were also diagnosed with autism.

9. Service Agency completed a social assessment and psychological evaluation of claimant in September and October 2010. The social assessment indicated that claimant was unable to count money, her attention span was up to five minutes for most things, she required constant prompts to complete daily routines and did not generally initiate contact with peers. More information was requested regarding her medical history in order to determine her eligibility for Service Agency services.

10. Dr. Walker also used testing instruments to determine if claimant was autistic. The ADOS, Module 3, was completed and claimant’s communication and reciprocal social interaction skills were determined to be well within the “non-autistic range.” According to the examiner, claimant was able to engage in a variety of conversations with her, showing some gestures to aid in communication. She also sustained very good eye contact during the evaluation. Although claimant was unable to show insight into her role in relationships, including her friendships, she expressed that she had friends and enjoyed doing activities with them. She was also able to talk about her feelings in connection with her friends and her social life.

11. The psychological evaluation was conducted by clinical psychologist Ann L. Walker, Ph.D. Dr. Walker’s evaluation consisted of a record review, clinical interview, mental status exam, and various test instruments, including the Wechsler Intelligence Scale for Children- 4th Edition (WISC-4), Test of Non Verbal Intelligence- 3rd Edition (TONI-3), Wide Range Achievement Test-4th Edition (WRAT-4), Autism Diagnostic Observational Schedule Module 3 (ADOS, Module 3), Autism Diagnostic Interview-Revised (ADI-R), Gilliam Autism Rating Scale-2nd Edition (GARS-2), and Vineland Adaptive Behavior Scales-2nd Edition (Vineland-II).

12. During the testing, Dr. Walker noted that claimant sustained good eye contact, was cooperative, but “put forth very little effort.” Claimant tended to complete tasks impulsively and was not responsive to encouragement to take more time. Pursuant to the TONI-3, claimant’s cognitive intellectual skills measured at the borderline range which was

consistent with claimant's performance in all other areas. The WISC-4 was attempted, but because claimant refused to complete the instrument with "good effort," it was discontinued. Claimant's reading skills were determined to be at the 6th grade level and her math computation scores were noted to be in the "mild range" of delay, at the 2.7 grade level. Claimant's communication skills were in the borderline range, as she was able to engage in conversation with the examiner, but spoke softly. Claimant's self-help skills were noted to be significantly delayed as reported by her grandmother. Claimant's social skills were noted to be in the borderline range although claimant reported that she had many different friends and interests.

13. Dr. Walker also used the ADI-R and the GARS-2, both of which required input from claimant's grandmother. The ADI-R involved an interview with claimant's grandmother. Claimant's grandmother reported that claimant does not show good eye contact with her and does not ever initiate interaction with others. She also reported that claimant had significant delays in language development; however, she presently engages in conversation with her grandmother. Although she reported some instances of claimant getting upset by changes in her routine and engaging in repetitive movements, such as rocking, claimant did not show preoccupation with parts of objects.

14. The GARS-2 was a questionnaire completed by claimant's grandmother. Although the results indicated that claimant was in the "very likely probability of autism range," the examiner noted that the results may have been influenced by the grandmother's "unique way of responding to the GARS-2." The examiner explained:

It should be noted that Niara's grandmother had a unique way of responding to the GARS-2 that should be considered. Niara's grandmother was understandably focused on Niara's challenging behaviors. In addition, she answered some questions in an [*sic*] unique way. For example, Niara's grandmother reported that Niara twirls in a circle frequently, but when asked about this, she reported that Niara twirls her hair between her fingers and plays with her hair so much that some of her hair has actually fallen out. Niara's grandmother reported that Niara frequently spins objects not design [*sic*] for spinning frequently [*sic*] but when asked about this she reported that Niara plays with things. She does not spin objects, but she takes something like a pencil and rolls it back and forth and plays with it. Niara's grandmother reported that she shows self-abusive behavior frequently, but when asked about it she reported that this actually does not occur much anymore. The examiner tried to ask Niara's grandmother about each of her responses to the GARS-2, since she responded that many things were frequently observed, but when asked further [*she*] described a different behavior or a different frequency than the one specified by the GARS-2.

15. Dr. Walker also conducted a mental status exam of claimant and determined that claimant had been experiencing auditory hallucinations for the last two to four years. As such, she was receiving counseling and had been taking medication to treat the hallucinations. Despite the treatment, the auditory hallucinations occur frequently. Claimant also reported to Dr. Walker that she experiences significant depression without suicidal ideation.

16. Dr. Walker's examination further included an analysis regarding whether claimant met the diagnostic criteria for Autistic Disorder according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV- TR) (2000). Based on Dr. Walker's own assessments, claimant's prior assessments including the October 1998 social assessment and the February 1999 Psychological Evaluation, her medical and school records, and interviews with claimant and her grandmother, Dr. Walker opined that claimant's behaviors are "inconsistent with the diagnosis of Autistic Disorder." Dr. Walker's diagnostic impressions of claimant were that her behaviors were the result of Schizoaffective Disorder with Borderline Intellectual Functioning. Her recommendation for claimant was that claimant continue to receive psychiatric care to treat her Schizoaffective Disorder and obtain appropriate medication to eliminate her auditory hallucinations. She further recommended that claimant continue to receive psychotherapy and attempt to obtain additional support from her school district based on her apparent "serious emotion[al] disorder."

17. Dr. Heike Ballmaier is a Psychologist and Board Certified Behavior Analyst. She is a Psychology Consultant for Service Agency and performs weekly psychological assessments of potential consumers to offer diagnostic and eligibility recommendations. She also participates in "interdisciplinary staffing meetings" to determine eligibility for potential consumers. Dr. Ballmaier attended the interdisciplinary staffing meeting regarding claimant to determine if claimant was eligible for Service Agency services. She reviewed claimant's records that were considered by the staffing team, although she has never personally met claimant. Dr. Ballmaier testified on behalf of Service Agency regarding the reasons Service Agency did not find claimant eligible for services. She testified regarding the process utilized by Service Agency in determining eligibility and the evidence relied upon by the team. Dr. Ballmaier's testimony was competent, objective and credible.

18. Dr. Ballmaier explained the criteria for Service Agency eligibility under the Lanterman Act, including the specific requirements for eligibility due to autism, mental retardation or what is commonly known as the "fifth category," which includes conditions that are similar to mental retardation or that require treatment similar to mental retardation. According to Dr. Ballmaier, claimant does not qualify for regional center services under any of these categories because claimant does not exhibit behaviors that indicate autistic disorder. Dr. Ballmaier opined that claimant's attention difficulties and lack of focus may have been the cause of many of the behaviors that claimant's grandmother was concerned about.

19. Dr. Ballmaier also opined that claimant's intellectual functioning, although borderline, does not indicate mental retardation. Dr. Ballmaier specifically referred to claimant's psychological test results at age four that indicated that she was "Borderline Intellectual Functioning (not MR) with Higher Potential Suggested." (Factual Finding 4.) According to Dr. Ballmaier, claimant's test results may have been influenced by her lack of compliance, attention issues and lack of effort, which is why the assessor commented that claimant's potential may have been higher than the scores reflected in the assessment. For example, claimant scored a 79 in verbal reasoning, which is close to average. If she had MR, the score would have been lower. Furthermore, at age 15, it became more prominent that claimant's difficulties in school were due to a learning disability and not due to MR because there was a discrepancy between claimant's ability and her achievement. At this time, claimant's mental health diagnoses also became more prevalent and may have had some impact on her learning and her behaviors.

20. Claimant did not dispute Dr. Ballmaier's findings or opinions, but feels that she requires more help in school and with her mental health issues.

LEGAL CONCLUSIONS

1. In this appeal, claimant has the burden of proof to show by a preponderance of the evidence that she is eligible for regional center services. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; Evid. Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."])

2. The Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) and implementing regulations define the conditions that qualify an individual for regional center services. For a person to be eligible for regional services, the person must meet all four of the eligibility criteria identified in the Lanterman Act. The person must have a "developmental disability," as defined in the Act. (See Legal Conclusion 3.) The developmental disability must have originated before the individual attained the age of 18. The developmental disability must be likely to continue indefinitely, and it must constitute a substantial disability for the individual. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000.)

3. A "developmental disability," as defined in the Lanterman Act, is a disability attributable to any of the following four conditions, mental retardation, cerebral palsy, epilepsy and autism. Or, it may be attributable to unspecified disabling conditions, known as "fifth category" conditions. Fifth category conditions are those found to be "closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation..." (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000.) According to the Association of Regional Center Agencies' (ARCA's) interpretation of the regulations, the fifth category also includes an individual who "functions in a manner similar to that of a person with mental retardation."

4. Claimant failed to establish that she has a qualifying disability. Although it is undisputed that claimant has a learning disability and mental health impairments that affect her learning and behavior, neither of those conditions qualify claimant for regional center services. The regulations expressly omit such conditions from eligibility. According to California Code of Regulations, title 17, section 54000, subdivision (c),

Developmental disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

5. For the reasons set forth in Factual Findings 4 through 19, and Legal Conclusions 1 through 4, claimant does not qualify for Service Agency services.

ORDER

Claimant Niara W.'s appeal is denied. The North Los Angeles County Regional Center's determination that claimant is not eligible for Service Agency services is affirmed.

DATED: September 13, 2011

SOPHIE C. AGOPIAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days.